VIRGINIA LAW REGISTER.

E. C. BURKS, Bedford City, Va.....EDITOR.
C. A. GRAVES, Washington & Lee University, Lexington, Va., } ASSOCIATE
W. M. LILE, University of Virginia, Charlottesville, Va., } EDITORS.

Issued Monthly at $5 per Annum. Single Numbers, 50 Cents.

Communications with reference to CONTENTS should be addressed to the EDITOR at Bedford City, Va.; BUSINESS communications to the PUBLISHERS.

MISCELLANEOUS NOTES.

THE question of the admissibility of the testimony of a deceased witness in criminal cases, discussed ante p. 807, is exhaustively treated in the opinion of the Supreme Court of the United States in the recent case of *Mattox v. U. S.*, 156 U. S. 237, and in the dissenting opinion of Mr. Justice Shiras.

THE tender of an old and rare silver coin differing in appearance from coin of later date is held valid, in *Atlanta Consol. St. R. Co. v. Keeny* (Ga.), 33 L. R. A. 824, when offered for fare in a street car, although the conductor believed it was counterfeit. The annotation to the case reviews the authorities on the tender of old, worn, and mutilated coin.

THE right of a husband to recover alimony out of a divorced wife's separate estate is denied, in *Greene v. Greene* (Neb.), 34 L. R. A. 110, whether the divorce be granted to the husband or to the wife. With the case is a note presenting the authorities, which are somewhat numerous, on the allowance to a husband from property held by the wife in divorce cases. See 2 Va. L. R. 308.

THE performance of a contract by a party who has hesitated or refused to complete it is held, in *Abbott v. Doane* (Mass.), 34 L. R. A. 33, to constitute a good consideration for a promise by a third person who will be benefited by such performance. The numerous and conflicting authorities on the effect of the performance of an existing contract obligation as a consideration for a new promise are carefully considered in a note to this case. See also Bishop on Contracts, 837; note to *Davis v. Bronson* (N. Dak.), 33 Am. St. Rep. 783.

AN implied liability of the estate of a deceased person for reasonable and proper burial expenses, although they were neither ordered nor ratified by the subsequently appointed executor or administrator, is upheld in *Fogg v. Holbrook* (Me.) 33 L. R. A. 660, on the ground that it arises from the peculiar necessities of the situation, and it is held enforceable against an executor in his representative capacity. The numerous and somewhat inconsistent authorities on the liability or a decedent's estate for funeral expenses are collected in a note to this case.

A partnership to carry on the business of letting for immoral purposes furnished apartments is held, in *Chateau v. Singla* (Cal.), 33 L. R. A. 750, to be based upon an illegal contract under which relief will not be granted to either party for a settlement of the partnership, although the tenements leased for such purposes are in a section of the city which is mainly given up to such business without interference by the police.

A similar ruling was made by the Virginia Court of Appeals, in *Watson v. Fletcher*, 7 Gratt. 131, in connection with a partnership for gambling purposes. See also 3 Minor's Inst. 706.

THE right of a subscriber to the stock of an unorganized corporation to withdraw from the enterprise is asserted in *Bryant's Pond Steam Mill Co. v. Felt* (Me.) 33 L. R. A. 593, provided he exercises the right before the corporation is organized and his subscription accepted. The authorities on the withdrawal of subscription for shares of a corporation are found in the annotation to this case. See 2 Morawetz on Corporations (2d ed.), secs. 43 *et seq.*; *Griffin v. McCauley*, 7 Gratt. 476; *Stuart v. Valley R. Co.*, 32 Gratt. 146; *Lewis v. Glenn*, 84 Va. 947, 984; *Parker v. Thomas* (Ind.), 81 Am. Dec. 385, and extensive note; *Richelieu Hotel Co. v. International etc. Co.* (Ill.), 33 Am. St. Rep. 234, and note.

JURISDICTION OF COUNTY COURT ON TRIAL FOR FELONY TO SENTENCE FOR MISDEMEANOR.—By Act approved March 5, 1896, (Acts 1895-'96, p. 924, c. 845), it is declared: "The several police justices and justices of the peace, in addition to the jurisdiction exercised by them as conservators of the peace, shall have exclusive original jurisdiction of all misdemeanor cases occurring within their jurisdiction, in all of which cases the punishment may be the same as the county and corporation courts are authorized to impose," &c.

In commenting on this act in note to *Lacey* v. *Palmer*, 2 Va. Law Reg. 95, this question is asked by Judge Burks: "Under our statute law, in numerous instances, the accused charged with a felony may be acquitted by the jury of the felony and convicted of a misdemeanor. *Quære:* How are these statutes affected by the Act before referred to, of March 5, 1896? Has the court jurisdiction, since that Act, to render judgment on the verdict as for a misdemeanor?"

In Clark's Criminal Procedure, p. 6, the law on this point is thus laid down: "If a court has jurisdiction of the offense charged, its jurisdiction is not ousted by proof of a less offense, of which it could not have taken jurisdiction. On indictment for grand larceny, for instance, the defendant may be convicted of petit larceny, though the court would have had no jurisdiction of a charge of petit larceny." He cites, in support of the text, *People v. Rose*, 15 N. Y. Supp. 815; *People v. Fahey*, 64 Calif. 342; *Ex parte Bell* (Calif.), 34 Pac. 641; *State v. Fesperman*, 108 N. C. 770; *Winburn v. State*, 28 Fla. 839.

The doctrine as laid down by Clark seems to us reasonable, supported by the analogies of the law, and decidedly in accordance with expediency and public policy. We understand, however, that there is great difference of opinion on the subject, and that conflicting decisions have been made by the County and Circuit Courts. In this state of affairs, and in the absence of a ruling by the Court of Appeals, we invite the views of our readers for publication in the REGISTER.

C. A. G.

HON. WILLIAM L. WILSON, PRESIDENT-ELECT OF WASHINGTON AND LEE UNIVERSITY.—The election of Hon. William L. Wilson to the presidency of Washington and Lee University, made vacant by the resignation, by reason of ill-health, of Gen. G. W. Custis Lee, was received with general and hearty approval; and the University is to be congratulated on his acceptance, which is now formally announced. Mr. Wilson will enter upon his duties as President July 1, 1897, when Gen. Custis Lee will retire as President-Emeritus, after a period of service of nearly twenty-seven years.

As has been pointed out, it is a remarkable fact that the Institution which, after the war, was for five years presided over by General Robert E. Lee, the commander-in-chief of the Army of Northern Virginia, will now have as its President one who fought through the war in the same army as a private in the ranks.

We take the following sketch of Mr. Wilson from the *Rockbridge County News:*

"Hon. William L. Wilson, Washington and Lee's president elect, early in his career in Congress earned for himself the name of the 'Scholar in Politics.' His reputation as a statesman is more than national, but few are aware that his early years were spent as a scholar and teacher. He entered Congress from a university president's chair, and his retirement from public life is marked by his resumption of the same position in another institution. By a leading New York journal, which has not agreed with his policy as a statesman, he has long been spoken of as Professor Wilson; not an inappropriate title, for he is yet associated with the Columbian University, Washington, as lecturer on American economic legislation. He brings to the president's chair at Washington and Lee ripe scholarship, combined with a valuable acquaintance with and an intimate knowledge of men and affairs, acquired during a successful and honored career in public life, a part of which was spent as an executive officer.

"William Lyne Wilson was born in Jefferson county, Va. (now W. Va.), May 3, 1843. He was educated at Columbian College, D. C., and at the University of Virginia. He received the degree of A. B. from the Columbian College in 1860, and that of A. M. in 1865. He is an LL. D. of Columbian University and also of Hampden Sidney College. Mr. Wilson served in the Confederate army during the war as a private in Captain Baylor's company, Twelfth Virginia cavalry. He was, from 1865 to 1871, assistant professor and professor of Latin in Columbian University. In the latter year he entered upon the practice of law in his native county at Charlestown, W. Va. In 1882 he was made President of the West Virginia University. In the fall of the same year he was elected to Congress from the Charlestown district, and was re-elected for five successive terms, retiring in 1895. In that year he was appointed Postmaster-General of the United States by President Cleveland, whose confidence he enjoys to an extent possessed by few men. It is superfluous to state that his public career has been a distinguished one. He early became a man of note in Congress, not only by reason of his knowledge and ability, but of his high character, lofty purposes, and just and kindly temperament which gained for him the admiration and good will of political friends and foes alike. In 1893 he was made chairman of the Ways and Means Committee, which carried with it the leadership of the House, and championed the passage of all the important measures of that session, notably the repeal of the Sherman

silver purchase law and the enactment of the Wilson tariff bill. He will leave public life on March 4th with a record singularly able, honest, and pure.

"Mr. Wilson's family consists of his wife and three sons and two daughters. All of his children but the youngest daughter are grown. He is a member of the Baptist church."

DEATH OF JOHN RANDOLPH TUCKER.—This sad event occurred at Lexington, Va., Feb. 13. Seldom if ever have we known such universal sorrow at the death of any man; and the press, religious and secular, has voiced the sentiment of the people in praise for his noble life, and in regret, sincere and deep, that it is ended. The interment was at Winchester, Va., beside his father and mother—the spot he had always intended as his burial place.

In the April REGISTER we expect to print a full account of Mr. Tucker's life and public services, with a portrait approved by his family. We now subjoin an estimate of Mr. Tucker as a lawyer and teacher, as a man and citizen, which we take from the minute adopted by the Faculty of Washington and Lee University, with which institution he had been connected, as professor or lecturer in the Law School, for a period of over twenty-six years:

"As a lawyer, Mr. Tucker seized as if by intuition on the pivotal point of a case, and presented it to the court or jury with a clearness and force that were usually irresistible. His mind was acute and discriminating to a degree never, perhaps, excelled. His learning was extensive and accurate, and he possessed an acquaintance with the English decisions now rarely found. He was a student of the civil law, and urged its study in connection with that of the common law. His arguments before the Supreme Court of the United States elicited the admiration of the judges of that august tribunal; and his views were treated by the court with a deference similar to that shown by the judges of England to those of another great American advocate, Mr. Judah P. Benjamin.

"As a teacher, Mr. Tucker's power lay in the presentation of fundamental principles. A theme of interest and importance would arouse him to his highest effort. Then, no matter how difficult and intricate the subject, he would begin at the beginning, trace the doctrine from its source, hold it up to to view on every side, and throw upon it such a flood of light that when he concluded it would stand out before the mind with all the clearness of a geometrical demonstration. He never failed to grasp the underlying principles of the law, and his discussions gave not merely the dry bones of decided cases, but were teeming with suggestions, and pregnant with germinal ideas destined to live and expand in the mind of the student, and to bear rich fruit in multifarious applications in practice. Such were his gifts of language and expression, that many of his sentences can be recalled to-day by his pupils, after a lapse, in some cases, of many years.

"As a man, Mr. Tucker's characteristic was that he always carried sunshine with him—the radiation of a warm and loving heart. No one could meet him and not be the happier and better for it. His adaptability was marvellous—he said the right thing to everybody. As has been well said, 'No man could be in his company and be cast down or depressed, cold or reserved.' No wonder that everyone loved him, and that he numbered devoted friends by the score. He was the most entertaining of men, but mingled instruction with amusement, with

'heart-affluence of discursive talk.' His conversation sparkled with wit and rippled with humor, but he hurt no man's self-love, and his sallies left no sting.

"But this was only one side of Mr. Tucker's character, though that oftenest presented to his friends and to the public. He was a man of strong convictions on all subjects, and could on occasion pass 'from lively to severe,' and be serious even to sternness. He was an indefatigable worker, not trusting to talent, but applying his mind to thorough investigation with the utmost intensity, often sitting up late at night or rising at daylight for the purpose. But above all, he was an earnest, devoted Christian, walking humbly before his God. He felt constant solicitude for the conversion of others, and did all in his power to lead them into the way everlasting. For many years he conducted a Bible class in Lexington, which was largely attended by the students of the University and others.

"As a citizen, Mr. Tucker was profoundly interested in public questions, and always ready to express his views by speech or pen. He made many addresses, choosing practical but lofty themes, calculated not only to enlighten the mind, but to stir the heart to noble purpose. He was an ardent patriot, and accepting the results of the war, rose far above sectional narrowness in his zeal for the welfare of a common country. But it was upon his native Virginia that he lavished the full wealth of his affection. 'God save the Commonwealth' was ever to him an earnest prayer. He ended one of the last addresses he ever made, that before the Richmond Bar Association, with the following touching words:

"'For myself, my race is nearly run. But when my head shall rest upon the bosom of this great Commonwealth, near to the spot where I drew my first breath, my last aspiration will be, and I invoke you to join in it, that amid all the evils which environ us, and the dangers that menace us, our venerable mother Virginia shall be protected by God's good providence, and guided into paths of peace, prosperity, and glory.'"

Railroad Companies—Constitutionality of Statutes Imposing Burdens Outside of Charter—Fires—Fences.—We publish in full elsewhere in this issue the opinion of the Supreme Court of the United States in *St. Louis & San Francisco Railroad Co. v. Mathews.* The opinion by Mr. Justice Gray contains an extremely learned and exhaustive discussion of the common law liability for accidental and negligent fires; of the statutory provisions regulating the same, both in England and in various States of the Union; and of the right of the States, in exercise of their police power, to impose additional burdens and restrictions upon corporations previously chartered, when deemed necessary for the protection of the lives, property or health of the public.

The decision in brief is that a State may provide by statute that railroad companies shall be liable for all damages to property along their rights of way, caused by fire from their locomotives, although without negligence; and that such a statute, though passed after the incorporation of a railroad company, does not constitute a breach of the contract between the State and the company, as contained in the corporate charter.

We have no statute in Virginia regulating the liability of railroad companies for fires communicated from their locomotives to property along their right of way (other than requiring them to use approved spark-arresters—Code 1887, sec. 1264), but the common law liability has been judicially declared in

several cases. *R. & D. R. Co. v. Medley*, 75 Va. 499; *Brighthope Railway Co. v. Rogers*, 76 Va. 443; *New York etc. R. Co. v. Thomas*, 92 Va. 606 (24 S. E. 264); *Bernard v. Richmond, F. & P. R. Co.*, 85 Va. 792; *Patteson v. C. & O. R. Co.* (Va.) 26 S. E. 393. These cases establish the principle that a railroad company is not responsible for damage to property along its route caused by fire from its locomotives, unless the company be guilty of negligence; that this negligence may consist either in using defective appliances, or in allowing combustible material to accumulate on its right of way, the ignition of which by sparks from its engines communicates fire to adjoining property; that abutting land-owners are not bound to remove combustible material from their own lands in order to obviate the possible or probable negligence of the railroad company; and that evidence of previous or subsequent fires caused by defendant's locomotives is admissible to establish defective appliances or a negligent habit on the part of the company's officers and agents. The case last cited maintains the further proposition that though the burden of proving negligence is on the plaintiff, yet when he has traced the origin of the fire to the defendant's locomotive, he establishes a *prima facie* case of negligence, which it is upon the defendant to rebut—overruling on this point the previous case of *Bernard v. Richmond, F. & P. R. Co., supra.*

A question similar to that raised in the case of *St. Louis etc. Railroad Company v. Mathews* is presented in connection with statutes requiring railroad companies to fence their rights of way, where such statutes are enacted subsequent to the incorporation. The Virginia statute requiring railroad companies to fence their road-beds (Code 1887, secs. 1258-1261) has several times come up for construction before the Virginia Court of Appeals, but no question of its constitutionality seems to have been made. *McGavock v. N. & W. R. Co.* 90 Va. 507; *N. & W. R. Co. v. Johnson*, 91 Va. 661. Under the ruling of the Federal Supreme Court, above referred to, there would seem to be no doubt that the statute is constitutional. Indeed, this seems to have been established by express decision of the Supreme Court in *Missouri Pacific R. Co. v. Humes*, 115 U. S. 512, quoted with approval in the more recent case upon which we have just commented. The general subject of liability of a railroad company in connection with fencing its road-bed when under a duty to do so, whether by law or by contract, is discussed at length in note to *Towanda R. Co. v. Munger* (N. Y.), 49 Am. Dec. 268-272. See also *Oregon etc. R. Co. v. Smalley* (Wash.), 22 Am. St. Rep. 143 and note; *Jacksonville etc. R. Co. v. Harris* (Fla.), 39 Am. St. Rep. 127 and note.

THE SOUTH CAROLINA LIQUOR LAW.—In *Scott v. Donald*, 17 Sup. Ct. 265, the Supreme Court of the United States, in an opinion by Mr. Justice Shiras (Mr. Justice Brown dissenting), puts the stamp of its disapproval upon the famous Dispensary Acts of South Carolina. The court holds that while a State may, under the Act of Congress of August, 1890 (26 U. S. Stat. 313), prohibit the importation, manufacture, sale and use of intoxicating liquors, as articles detrimental to the health of its inhabitants, that statute was not intended to confer upon the States the power to discriminate against the products of other States as to articles, the manufacture and use of which are not forbidden.

The court also held that a suit to restrain public officials of the State from unlawfully seizing plaintiff's property under color of an unconstitutional statute,

or to recover damages therefor, is not an action against the State. *Re Tyler*, 149 U. S. 164.

In the discussion of the former branch of the subject, the court said, in part:

"It is not an inspection law. The prohibition of the importation of the wines and liquors of other States by citizens of South Carolina for their own use is made absolute, and does not depend on the purity or impurity of the articles. Only the State functionaries are permitted to import into the State, and thus those citizens who wish to use foreign wines and liquors are deprived of the exercise of their own judgment and taste in the selection of commodities. To empower a State chemist to pass upon what the law calls the "alcoholic purity" of such importations by chemical analysis can scarcely come within any definition of a reasonable inspection law.

"It is not a law purporting to forbid the importation, manufacture, sale, and use of intoxicating liquors, as articles detrimental to the welfare of the State and to the health of the inhabitants, and hence it is not within the scope and operation of the Act of Congress of August, 1890. That law was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce. When that law provided that 'all fermented, distilled, or intoxicating liquors transported into any State or territory, remaining therein for use, consumption, sale, or storage therein, should, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and should not be exempt therefrom by reason of being introduced therein in original packages or otherwise,' evidently equality or uniformity of treatment under State laws was intended. The question whether a given State law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the State cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful.

"Whether those provisions of the Act which direct that so-called contraband liquors may be seized without warrant by any State constable, sheriff, or policeman, while in transit or after arrival, whether in possession of a common carrier, depot agent, express agent, or private person, and which subject common carriers to fine and imprisonment for carrying liquors in any package, cask, jug, box, or other package, under any other than the proper name or brand known to the trade, and which forbid the bringing of any suit for damages alleged to arise by seizing and detention of liquors under the Act, would be lawful in an inspection law otherwise valid, we do not find it necessary to now consider. It was pressed on us, in the argument, that it is not competent for a State, in the exercise of its police power, to monopolize the traffic in intoxicating liquors, and thus put itself in competition with the citizens of the other States.

"This phase of the subject is novel and interesting, but we do not think it necessary for us now to consider it. It is sufficient for the present cases to hold,

as we do, that when a State recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other States; that such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting State as against similar products of the other States."

CONSTITUTIONAL LAW.—RAILROAD COMPANIES.—RECOVERY OF ATTORNEY'S FEES.—The converse of the ruling in *St. Louis etc. Railroad Co. v. Mathews*, elsewhere reported and commented upon in this issue, is presented in the case of *Gulf, C. & S. F. R. Co. v. Ellis*, recently decided by the same court (17 Sup. Ct. 255).

The case involved the constitutionality of a statute of Texas, providing that railroad companies failing to pay claims less than $50 for labor, stock killed, damages or overcharges on freight, within thirty days after presentation, should be liable for an attorney's fee not exceeding $10.

The court, through Mr. Justice Brewer, held such a statute void, as depriving railroad companies of their property without due process of law, and in denying to them the equal protection of the laws.

We make the following extract from the opinion:

"The Supreme Court of the State considered this statute as a whole and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute.

"It is true the amount of the attorney's fee which may be charged is small, but if the State has the power to thus mulct them in a small amount it has equal power to do so in a larger sum. The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it, if only a shilling be involved. As well said by Mr. Justice Bradley in *Boyd v. United States*, 116 U. S. 616, 635: 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in

sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*'

"While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining State action.

"It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. *Santa Clara County v. Southern P. R. Co.*, 118 U. S. 394; *Pembina Consol. Silver Min. & M. Co. v. Pennsylvania*, 125 U. S. 181, 189; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26; *Charlotte C. & A. R. Co. v. Gibbes*, 142 U. S. 386; *Covington & L. Turnp. R. Co. v. Sandford*, 164 U. S. —. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens.

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (*Hayes v. Missouri*, 120 U. S. 68; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205; *Walston v. Nevin*, 128 U. S. 578; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339; *Giozza v. Tiernan*, 148 U. S. 657; *Columbus S. R. Co. v. Wright*, 151 U. S. 470; *Merchant v. Pennsylvania R. Co.*, 153 U. S. 380; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1), yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorneys' fees of parties successfully suing them, and all black men not. It may not say that a man beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

"As well said by Black, J., in *State v. Loomis*, 115 Mo. 307, 314, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employees any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void: 'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class

legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land.'

"In *Vanzant v. Waddel*, 2 Yerg. 260, 270, Catron, J. (afterwards Mr. Justice Catron of this court), speaking for the Supreme Court of Tennessee, declared: 'Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law, by another.'

"In *Stratton v. Morris* 89 Tenn. 497, Baxter, Special Judge, reviewing at some length cases of classification, closes the review with these words: 'We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural and not arbitrary.'

"In *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, the question was presented as to the power of the State to classify for purposes of taxation, and while it was conceded that a large discretion in these respects was vested in the various legislatures, the fact of a limit to such discretion was recognized, the court, by Mr. Justice Bradley, saying on page 237: 'All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition.'

"It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorneys' fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other.

"If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroads of all corporations are selected to bear this penalty. The rule of equality is ignored.

"It may be said that certain corporations are chartered for charitable, educational, or religious purposes, and abundant reason for not visiting them with a penalty for the non-payment of debts is found in the fact that their chartered privileges are not given for pecuniary profit. But the penalty is not imposed

upon all business corporations, all chartered for the purpose of private gain. The banking corporations, the manufacturing corporations, and others like them, are exempt. Further, the penalty is imposed, not upon all corporations charged with the *quasi*-public duty of transportation, but only upon those charged with a particular form of that duty. So, the classification is not based on any idea of special privileges by way of incorporation, nor for special privileges given thereby for purposes of private gain, nor even of such privileges granted for the discharge of one general class of public duties.

"But if the classification is not based upon the idea of special privileges, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the peculiar business in which they are engaged—is a just classification, and not one within the prohibition of the Fourteenth Amendment. Thus it is frequently required that they fence their tracks, and as a penalty for a failure to fence double damages in case of loss are inflicted. *Missouri P. R. Co. v. Humes*, 115 U. S. 512. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged—a duty not resting upon others; a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the State, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the State and with a view to enforce just and reasonable police regulations.

"While this action is for stock killed, the recovery of attorneys' fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The legislature of the State has not deemed it necessary for the protection of life or property to require railroads to fence their tracks, and as no duty is imposed, there can be no penalty for non-performance. Indeed, the statute does not proceed upon any such theory; it is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the Supreme Court of the State.

"But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the State, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency.

"Neither can it be sustained as a proper means of enforcing the payment of small debts and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency this statute cannot be sustained.

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo v. Hopkins*, 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

Mr. Justice Gray filed a dissenting opinion, concurred in by the Chief Justice and Mr. Justice White.